UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	
	)	Docket No. TSCA-05-2002-0010
Meljenko Protega,	)	
	)	
Respondent.	)	
	)	

Order Disposing of Outstanding Pre-Answer Motions

This matter is a civil administrative action issued under the authority vested in the Administrator of the United States Environmental Protection Agency (U.S. EPA) by Section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a). Complainant, U.S. EPA, seeks a $102,410 penalty against Respondent, Meljenko Protega, for 92 alleged violations of Section 1018 of Title X, the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4851, and its regulations promulgated at 40 C.F.R. Part 745, Subpart F, Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property.

This matter is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (CROP), 40 C.F.R. Part 22.

By Order of Remand dated January 21, 2003, Chief Administrative Law Judge Susan Biro remanded this matter to the Regional Judicial Officer, EPA Region 5, to issue rulings on motions filed prior to the filing of an Answer. This matter had been erroneously forwarded to the Office of Administrative Law Judges prior to disposition of the outstanding pre-answer motions. The motions are as follows:

- Motion for Default Upon Failure to File a Timely Answer (Motion for Default)
- Motion to Vacate Any Default Judgment and Motion for Extension of Time to Answer Complaint (Motion to Vacate/Extension of Time).

For the reasons stated below, the Motion for Default is denied; the Motion to Vacate is deemed moot; the Motion for Extension of Time is granted.

Pre-Answer Procedural Background

The Complaint was filed on April 4, 2002. The Respondent's Answer was due on or before May 6, 2002. Complainant filed its Motion for Default on May 13, 2002. An Order to Show Cause and Order to Supplement the Record was issued on September 11, 2002. Complainant filed a Motion for Extension of Time to Supplement the Record on October 4, 2002. An Order Granting Extension of Time, until October 22, 2002, was issued on October 7, 2002. Complainant filed a Second Motion for Extension of Time to Supplement the Record on October 17, 2002. An Order Granting Extension of Time, until November 8, 2002, was issued on October 22, 2002. Complainant's Response to Order to Supplement the Record was filed on November 5, 2002. Respondent filed a Motion to Vacate Any Default Judgment and Motion for Extension of Time to Answer the Complaint on December 3, 2002. Complainant filed Complainant's Response to Respondent's Motion to Vacate Any Default Judgment and Motion for Extension of Time to Answer Complaint on December 4, 2002. Respondent filed Respondent's Reply to Complainant' Response to Respondent's Motion to Vacate Any Default Judgment and Motion for Extension of Time to Answer Complaint on December 16, 2002. On December 17, 2002, prior to decision on the outstanding pre-answer motions, the case file was forwarded to the Office of Administrative Law Judges. The Order of Remand was issued on January 21, 2003.

I. Motion for Default

A. Legal Standard

By Motion for Default, Complainant, U.S. EPA, moves for Order granting default upon failure to file a timely answer to the complaint and assessing a civil penalty in the amount of $102,410, as pled in the complaint.

Under 40 C.F.R. § 22.17:

> (a) *Default.* A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint.... Default by the respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations....
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> (c) *Default Order.* When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default should not issue.

Section 22.17(a) of the CROP offers no specific requirements or criteria as guidance in deciding whether to enter a default. This provision is analagous to Rule 55 of the Federal Rules of Civil Procedure (Fed. R.Civ. Pro.). As stated *In the Matter of Jefferson Baptist School,* "While the Fed. R.Civ. Pro. are not applicable to the proceedings, consideration of the practice and precedent thereunder is not inappropriate where the applicable section of the CROP (Section 22.17) embodies concepts analogous to those in the Fed. R. Civ. Pro." Docket No. TSCA-V-C-029-92 (Sept. 9 1993).

Under modern procedure, defaults are not favored. See *Davis & Co. v. Fedder Data Center, Inc.,* 556 F.2d 308 (5th Cir. 1977). Doubts are usually resolved in favor of the defaulting party. See *In Re Rybond, Inc.*, 6 E.A.D. 614, 616 (1996); *In the Matter of Herman Roberts*, OPA Docket No. 99-512. (R6 April 14, 2000). A default is generally a harsh measure and should not be entered where there has been some responsible action and attempts at a defense. See *In the Matter of Southside Baptist Church,* TSCA Docket No. VI-479C(A) (November 13, 1992).

A diligent party is not entitled to a default order as a matter of right even when the unresponsive party is technically in default. In view of the harshness, default orders are not favored by the law as a general rule and cases should be tried on their merits whenever reasonably possible. *Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d*, Sections 2681-2685, pp. 398-429.

Where a defendant's failure to plead or otherwise defend is merely technical, or where the default is de minimis, the court should generally refuse to enter a default judgment. On the other hand, where there is reason to believe that the defendant's default resulted from bad faith in his dealings with the court or opposing party the district court may properly enter default and judgment against defendant as a sanction. *Moore's Federal Practice*, § 55.05[2], pp. 54-24 (1991).

Indications of a respondent's responsiveness or lack thereof can be gleaned from the record of a proceeding. *Jeffersonville Baptist School*, *supra.*

B. Discussion

Service of the Complaint was complete on April 6, 2002. Respondent's Answer was to be filed on or before May 6, 2002. On May 13, 2002, Complainant filed its Motion for Default. On September 11, 2002, the Regional Judicial Officer issued an Order requiring Complainant to supplement the record within thirty (30) days and requiring Respondent to show cause, within ten (10) days as to why an order of default should not issue. Complainant timely requested and was granted two short extensions of time to respond. Pursuant to 40 C.F.R. § 22.7(c), adding 5 days for service by first class mail, Respondent's response to the Order to Show Cause was due on or before September 26, 2002.

The record contained no communication from Respondent until December 3, 2002, when

Respondent filed a Motion to Vacate Any Default Judgment and Motion for Extension of Time to Answer Complaint. Even at this date, in these motions, Respondent was silent as to why the default should not be granted. It was only in Respondent's December 16, 2002, Reply to Complainant's Response to Respondent's Motion to Vacate Any Default Judgment and Motion for Extension of Time to Answer Complaint, that Respondent first supplies any information and justification for its requests.

Respondent's defense is that he is of Croatian descent and has difficulty reading, writing and speaking English. Affidavit of Meljenko Protega, Exhibit 2 to Reply to Complainant's Response to Respondent's Motion(s). Respondent, representing himself, apparently had concurrent legal issues with the City of Chicago Department of Public Health and the U.S. Department of Housing and Urban Development (U.S. HUD) concerning the rental properties which are at issue in this proceeding. Respondent asserts that he received notices from the City of Chicago and U.S. HUD stating that the problems with his property had been resolved. Respondent has submitted a "Certificate of Compliance" related to lead hazards issued by the City of Chicago, dated May 23, 2002. Exhibit 3 to Reply to Complainant's Response to Respondent's Motion(s). Respondent states that he did not believe that he needed to respond to U.S. EPA because he was dealing with the City of Chicago.

Respondent is now represented by counsel and avers that Complainant will not be duly prejudiced if Respondent is allowed to answer the Complaint and present a defense.

It is true that Respondent did receive correspondence in May 2002 apparently resolving lead hazard issues with the City of Chicago. However, it stretches credibility to believe one would the consider Exhibit 3 a global resolution of all outstanding lead hazard issues. This is especially true since there was a continuing stream of correspondence from U.S. EPA. My Order to Show Cause was issued in September 2002, and various further motion practice by Complainant was served on Respondent in October and November 2002, long after the alleged resolution of the matter with the City of Chicago. In counterbalance, Respondent was pro se, was dealing with several government agencies and is not a native English speaker.

In reaching a decision, I need to balance Respondent's actions against the harsh penalty imposed by issuance of an order of default. Respondent has been unresponsive. However, I would not characterize him as contumacious or acting in bad faith. He has stated some reasons for his actions, or lack thereof. While Complainant would obviously prefer resolution of this matter by issuance of a default order, the matter is in the early stages of development and the prejudice to U.S. EPA is not extreme. Balancing the equities, respecting the strong reluctance by federal courts to issue defaults and their focus on having cases decided upon their merits whenever reasonably possible, I decline to issue this default order.

This decision is not meant to give other untimely respondents comfort. One ignores the legal process at one's risk. I do not suggest that untimely respondents rely on this decision as precedent. The equities were delicately balanced and under another set of facts could have easily resulted in an order of default.

The Motion for Default is DENIED.

2. Motion to Vacate Any Default Judgment and Motion for Extension of Time to Answer Complaint

Given my ruling denying Complainant's Motion for Default, Respondent's Motion to Vacate Any Default Judgment is moot.

In Respondent's Motion to Vacate/Extension of Time, filed December 3, 2002, Respondent requested thirty (30) days to answer the complaint. Respondent filed its Answer December 16 ,2002. Given my ruling on Complainant's Motion for Default, the Motion for Extension of Time to Answer Complaint is GRANTED.

In compliance with the Order of Remand, the Regional Hearing Clerk is instructed to forward the file to the Chief Administrative Law Judge.

SO ORDERED.

Dated: February 18, 2003

Regina M. Kossek
Regional Judicial Officer